

ORIGINAL
RECEIVED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

AUG 22 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

PP Docket No. 93-253

DOCKET FILE COPY ORIGINAL

PETITION FOR RECONSIDERATION OF
TELEPHONE ELECTRONICS CORPORATION

James U. Troup
Arter & Hadden
1801 K Street, N.W., Suite 400K
Washington, D.C. 20006
(202) 775-7960

August 22, 1994

No. of Copies rec'd
List ABCDE

042

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
I. Introduction	1
II. Procedural History	4
III. Partitioning That Precludes Independent Bidding in the Auction Does Not Fulfill the Commission's Statutory Responsibilities to Ensure that Rural Telephone Companies Participate in Broadband PCS	9
IV. The Gross Revenue, Assets and Net Worth of Rural Telephone Companies Should Not be Attributed to or Aggregated with Affiliates	14
V. TEC Qualifies as a Small Business Within the Meaning of Section 309(j)(3)(B) of the Communications Act	15
VI. The Commission's Gross Revenue Criteria Are Not Rationally Related to Their Purpose and Should Be Eliminated	18
VII. A Small Business Should be Defined as an Entity that, Together with its Corporate Affiliates, Has a Net Worth Of Less Than \$30 Million, Total Assets of Less Than \$300 Million and No Attributable Individual Investor With a Personal Net Worth of \$125 Million or More	23
VIII. Conclusion	25

SUMMARY

TEC is a privately-owned, small entrepreneurial company with its operations centered in rural areas of this country. Its core business consists of six rural telephone companies. Some of TEC's subsidiary companies also are resellers that provide long distance services.

TEC respectfully requests that the Commission reconsider its Fifth Report and Order in order to more fully carry out the goals of Congress to ensure participation by small and rural telephone companies in the provision of broadband personal communications services (PCS). Section 309(j)(3)(B) of the Communications Act requires the dissemination of PCS licenses among a wide variety of small businesses, rural telephone companies and businesses owned by members of minority groups and women. To achieve these statutory goals, TEC urges the Commission to allow a rural telephone company that, together with its corporate affiliates, has less than \$300 million in total assets to bid directly in the auctions for the entrepreneurs' blocks for complete BTA service areas. Furthermore, rural telephone companies should not be restricted to providing PCS in the BTAs where their wireline service areas are located as broadband PCS would enable rural telephone companies to further the Congressional goal of extending telephone service and new technologies to more Americans. This is particularly true in the Southern states where TEC's rural telephone companies operate which have some of the highest phoneless rates in the country.

Partitioning that precludes independent bidding in the auction does not fulfill the Commission's statutory responsibilities to

ensure that rural telephone companies participate in broadband PCS. While TEC's local exchange carriers are defined as rural telephone companies, as well as small telephone companies by the Commission's rules, the Fifth Report and Order disqualifies them from directly bidding on licenses in the entrepreneurs' blocks. Partitioning forces them to do business with other applicants or licensees in order to receive partitioned licenses for only their wireline service area. Other applicants and licensees, however, may not be willing to sell their interests to these rural telephone companies.

Permitting rural telephone companies to bid in the entrepreneurs' blocks for complete BTA service areas would further the Congressional goal that the Commission ensure economic opportunity for rural telephone companies. The Commission has acknowledged when it adopted BTAs in lieu of RSAs that the larger service areas are needed to effectively compete against cellular carriers and the holders of MTA licenses. The Commission has also stated that PCS service areas that are smaller than BTAs would reduce the efficiency and increase the costs of providing PCS. A complete BTA service area also avoids technical problems with limiting interference at the boundaries of a small PCS service area.

TEC also requests that the Commission reconsider its decision to attribute and aggregate the gross revenue, assets or net worth of rural telephone companies and their affiliates. Small telephone companies that are part of an affiliated group, such as TEC, should be allowed the same bidding preferences accorded other small

businesses. The courts have held that affiliation is not relevant when, as here, corporate and regulatory barriers prevent cross-pooling with these rural telephone companies.

State and federal regulations expressly prohibit such cross-subsidization among a local exchange carrier's affiliates. TEC's affiliates are separately incorporated with separate management and facilities and operate in different states. The Commission has found such structural separation to be an effective means of preventing cost-shifting. It is only reasonable for the Commission, in the absence of any evidence that a rural telephone company has the ability to shift costs between its affiliates, to provide bidding credits and allow installment payments for TEC's small, rural telephone companies.

The Fifth Report and Order added gross revenue criteria that preclude TEC's small, rural telephone companies from directly bidding on the licenses in the entrepreneurs' blocks and disqualify TEC from all bidding preferences accorded a small business. The Commission's gross revenue criteria are not rationally related to the Commission's stated purpose and should be eliminated. There is not adequate record support for the Commission's inclusion of a gross revenue criterion of \$125 million for determining eligibility to bid on licenses in the entrepreneurs' blocks. Nor is there a rational basis for adding the limit of \$40 million in annual gross revenue for determining eligibility to receive small business bidding preferences.

These gross revenue criteria are arbitrary, unnecessary and irrelevant to addressing the major problems facing small businesses -- lack of access to capital. The \$500 million total asset threshold adopted by the Commission already limits the size of a firm. A reasonable net worth cap for defining a small business and determining eligibility to bid on the licenses in the entrepreneurs' blocks would more accurately measure the proportion of those assets that are unencumbered and that can be used to bid in the auction for broadband PCS licenses. By contrast, gross revenue criteria prejudice small companies involved in volume-intensive businesses with small profit margins, such as TEC's interexchange resale carriers. Gross revenue criteria that assume interaffiliate cross-pooling exclude small, rural telephone companies that are affiliated with such resellers.

Gross revenue is no indication of the amount of funds that an entity has available to be used for bidding in an auction, especially when that entity is involved in a volume-intensive business with high operating costs and small profit margins, such as interexchange resale. As long as there is a \$500 million total asset threshold, there is no evidence that an affiliated group of small businesses, with \$350 million in gross revenue and less than \$40 million net worth, could outbid a single company with less than \$125 million in annual gross revenues but a \$99 million net worth. It is more likely that the single company, which has more than twice the net worth than the affiliated group and therefore more unencumbered assets with which to bid, will outbid the affiliated

group. The gross revenue criterion is irrational because it would permit the company with more resources with which to bid to participate in the auction for the entrepreneurs' block licenses while excluding the affiliated group with less resources.

Eliminating the gross revenue criteria will cure these defects. TEC recommends that the Commission define a small business as an entity that, together with its corporate affiliates, has a net worth of \$30 million, has total assets of less than \$300 million, and has no attributable individual investor with a personal net worth of \$125 million or more. The assets and personal net worth of individual investors should not be considered in determining whether a PCS applicant meets the \$40 million net worth standard or the \$300 million total asset threshold for a small business. Counting the net worth and assets of only corporate affiliates prevents double counting the value of the stock of individual investors that is inherent in the net worth and assets of the PCS applicant and its corporate affiliates. PCS applicants that meet this test should be allowed to bid directly in the auctions for the entrepreneurs' blocks, receive bidding credits as small businesses, and be eligible to pay for their winning bids in installments. Such a standard for defining a small business is more rationally related to the Commission's goal of ensuring that small businesses have the financial, managerial and technical resources to effectively participate in the auctions and compete in the provision of broadband PCS.

RECEIVED

AUG 22 1994

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of) PP Docket No. 93-253
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

TO: The Commission

**PETITION FOR RECONSIDERATION OF
TELEPHONE ELECTRONICS CORPORATION**

Telephone Electronics Corporation ("TEC"), by its attorney and pursuant to § 1.429 of the Commission's rules, respectfully petitions the Commission to reconsider its Fifth Report and Order in the above-captioned proceeding.¹

I. Introduction

TEC is a privately-owned, small entrepreneurial company with its operations centered in rural areas of this country. Its core business consists of six small local exchange carriers. Some of TEC's subsidiary companies also are resellers that provide long distance services.

The beginning of TEC dates back to 1923 when pioneers in the telephone industry, Donnie L. Fail and his wife, Estelle, purchased the telephone company in their hometown of Bay Springs, Mississippi. With a customer base of only 120 subscribers and an old magneto switchboard in their home, the Fail family devoted their career to providing telephone service to rural America. The

¹ In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding in PP Docket No. 93-253, Fifth Report and Order, 59 Fed. Reg. 37,566 (1994).

Fail family served their community with devotion and efficiency. As the hometown telephone company grew, developments in the communications field provided more opportunities to increase products and services.

Bay Springs Telephone Company is TEC's largest local exchange carrier. It serves 9,658 access lines in 14 rural communities in Mississippi. National Telephone Company of Alabama is TEC's smallest local exchange carrier, serving 1,983 access lines in three Alabama exchanges.

Bay Springs Telephone Company serves the communities of Bay Springs (population: 1,729), Big Creek (population: 129), Homewood (population: 70), Louin (population: 289), Old Taylorsville (population: no figures available), Pittman (population: no figures available), Polkville (population: 129), Rose Hill (population: 250), SoSo (population: 366), Sylvarena (population: 110), Walters (population: 150), White Oak (population: no figures available), Mont Rose (population: 106) and Paulding (population: 200).² It is believed that Old Taylorsville, Pittman and White Oak have populations of under 100 persons each.

Crockett Telephone Company is located in Friendship, Tennessee, and was acquired by TEC in 1984. Crockett Telephone Company serves 3,923 access lines and covers three Tennessee exchanges in Friendship (population: 467), Alamo (population: 2,426) and Maury City (population: 782).

² Population figures are obtained from the Rand McNally 1993 Commercial Atlas and Marketing Guide, 392-395, 123rd Edition.

National Telephone of Alabama, Inc. (d/b/a Cherokee Telephone Company) is located in the northwestern corner of Alabama in a town called Cherokee. The telephone company serves 1,983 access lines in three Alabama exchanges in Cherokee (population: 1,479), Margerum (population: 50) and Barton (population: 150). Cherokee Telephone Company has been a part of TEC since 1968.

Peoples Telephone Company, in Erin, Tennessee, was acquired by TEC in 1982. This telephone company serves 3,593 access lines in three exchanges in Tennessee serving Erin (population: 1,586), Tennessee Ridge (population: 1,271) and Henry (population: 317).

Roanoke Telephone Company, which was purchased by TEC in 1982, serves two exchanges in eastern Alabama. Roanoke Telephone Company serves 4,302 access lines. It serves the towns of Roanoke (population: 6,362), Rockmills (population: 650), and Rock Stand (population: no figures available) in Randolph County. Roanoke Telephone Company also provides local telephone service to Clackville (population: no figures available) and Standing Rock (population: 150) in Chambers County.³

West Tennessee Telephone Company became a member of TEC in 1983. This telephone company is located in Bradford, Tennessee, and serves 4,007 access lines. West Tennessee operates four Tennessee exchanges in Bradford (population: 1,154), Trezevant (population: 874), Atwood (population: 1,066) and Rutherford (population: 1,303).

³ 1993 Commercial Atlas and Marketing Guide, 251-252.

II. Procedural History

On September 23, 1993, the Commission announced the authorization of new personal communications services (PCS) in the 2 GHz emerging technologies band.⁴ Personal communications services are wireless telecommunications services designed to allow the customer to communicate by a special handset regardless of where the customer is located. PCS will provide a variety of mobile services competitive with existing cellular, paging and other land-mobile services as well as new services offering communications capabilities not currently available.

The Commission divided license allocations into channel blocks of 10 and 30 MHz of spectrum, divided by the Rand McNally major trading areas (MTAs) and basic trading areas (BTAs). The divisions are as follows:

<u>Channel Block</u>	<u>Frequency (MHz)</u>	<u>Service Area</u>
A (30 MHz)	1850-1865/ 1930-1945	MTA
B (30 MHz)	1870-1885/ 1950-1965	MTA
C (30 MHz)	1895-1910/ 1975-1990	BTA
D (10 MHz)	1865-1870/ 1945-1950	BTA

⁴ In re Amendment of the Commission's Rules to Establish New Personal Communications Services in GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993), modified on recon., Memorandum Opinion and Order, FCC 94-144, 59 Fed. Reg. 32,830 (1994).

<u>Channel Block</u>	<u>Frequency (MHz)</u>	<u>Service Area</u>
E (10 MHz)	1885-1890/ 1965-1970	BTA
F (10 MHz)	1890-1895/ 1970-1975	BTA

On October 12, 1993, the Commission released a Notice of Proposed Rulemaking, proposing to set aside two blocks of spectrum nationwide for bidding by designated entities composed of small businesses, rural telephone companies, or businesses owned by women or minorities.⁵ The Commission also proposed to allow these designated entities to use installment payment plans, with interest, for bids within the set-aside blocks.⁶ The Commission proposed to rely on the definition devised by the Small Business Administration for purposes of defining small businesses and to rely on the Commission's existing rules and policies for purposes of defining rural telephone companies and businesses owned by women and minorities.⁷ The Commission also requested comments concerning whether there should be any geographic restriction on the broadband PCS licenses upon which a rural telephone company may bid.⁸

⁵ In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding in PP Docket No. 93-253, Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7655-7656 (1993).

⁶ Id.

⁷ Id. at 7647.

⁸ Id.

The Commission received 222 comments and 169 reply comments and numerous ex parte presentations in response to its Notice of Proposed Rulemaking. TEC filed comments on November 10, 1993, and reply comments on November 30, 1993. TEC supported the Commission's proposed set-aside of a certain amount of spectrum for designated entities, including rural telephone companies, small businesses and businesses owned by women and/or minorities.

TEC asked that the Commission, when defining what constitutes a rural or small telephone company, employ definitions under existing Commission rules, which accurately reflect the telecommunications industry. TEC recommended that the Commission define a telephone company as a small business if it has 50,000 or fewer access lines. This recommendation was based on the Commission's rules which define telephone companies as small for purposes of filing tariffs when they have annual revenues from regulated telecommunications operations of less than \$40 million and 50,000 or fewer access lines.⁹ For the definition of "rural telephone company," TEC recommended including only local exchange carriers that serve places of 10,000 or fewer persons. This definition ensures that only telephone companies serving sparsely populated areas will be considered rural.

On July 15, 1994, the Commission released its Fifth Report and Order adopting its proposal to set aside specific spectrum blocks for broadband PCS that would be reserved for bidding by the

⁹ 47 C.F.R. §§ 61.39(a), 69.602(a)(3).

designated entities.¹⁰ The Commission established two entrepreneurs' blocks, C and F, as a specific response to TEC's comments which demonstrated that a small, rural telephone company operating with only a 10 MHz or 20 MHz license could not offer a full range of PCS services with a quality equivalent to the like offerings of a provider operating with a 30 MHz license.¹¹ At the same time, however, the Commission limited bidding eligibility for the entrepreneurs' blocks to entities that, together with their affiliates, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. The Commission also added a \$40 million gross revenue criterion to its small business definition.¹² These actions preclude TEC's small, rural telephone companies from bidding directly for licenses in the entrepreneurs' blocks and disqualify TEC from the bidding preferences awarded to small businesses.

The Commission also adopted a license partitioning system for rural telephone companies.¹³ The Commission generously defined "rural telephone company" as a local exchange carrier having 100,000 or fewer access lines, including all affiliates.¹⁴ However, rural telephone companies may not directly bid on broadband PCS licenses that are geographically partitioned from

¹⁰ Fifth Report and Order, slip op. ¶ 121.

¹¹ Id. ¶ 126.

¹² Id. ¶ 175.

¹³ Id. ¶ 151.

¹⁴ Id. ¶ 193.

larger PCS service areas, but instead must either form rural telephone company consortia or acquire partitioned licenses from other licensees through private negotiation and agreement either before or after the auction.¹⁵ Furthermore, a license for a partitioned area may contain no more than twice the population of that portion of a rural telephone company's wireline service area that lies within the PCS service area.¹⁶ The Commission concluded that "[w]e do not think that any other measures are necessary in order to satisfy the statute's directive that we ensure that rural telephone companies have the opportunity to participate in the provision of spectrum-based services, and to satisfy our goals to ensure that PCS is provided to all areas of the country, including rural areas."¹⁷

As described below, TEC urges the Commission to reconsider its Fifth Report and Order to ensure that TEC and its small, rural telephone companies have the opportunity to bid directly on licenses in the entrepreneurs' blocks and enjoy the same bidding credit and enhanced installment payments that are available to other small businesses.

¹⁵ Id. ¶ 151. A rural telephone company is also prohibited from directly bidding for unpartitioned licenses in the entrepreneurs' blocks if its affiliates have a combined annual gross revenue from both regulated and non-regulated operations of \$125 million.

¹⁶ Id.

¹⁷ Id. ¶ 153.

III. Partitioning That Precludes Independent Bidding in the Auction Does Not Fulfill the Commission's Statutory Responsibilities to Ensure that Rural Telephone Companies Participate in Broadband PCS

Partitioning is not rationally related to the Commission's stated purpose as long as it precludes rural telephone companies from bidding directly on licenses in the entrepreneurs' blocks. While TEC's local exchange carriers are defined as rural telephone companies as well as small telephone companies by the Commission's rules, the Fifth Report and Order disqualifies them from directly bidding on licenses in the entrepreneurs' blocks. Partitioning forces them to do business with other applicants or licensees in order to receive partitioned licenses for only their wireline service areas. Other applicants and licensees, however, may not be willing to sell their interests to these rural telephone companies. The Commission should avoid any speculation regarding such prospects.¹⁸

To ensure the dissemination of licenses to rural telephone companies, in accordance with Section 309(j) of the Communications Act, the Commission should allow rural telephone companies to bid directly in the auctions for the entrepreneurs' blocks. Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."¹⁹ The Commission is also

¹⁸ California v. FCC, 905 F.2d 1217, 1235 (9th Cir. 1990).

¹⁹ Communications Act § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D) (West Supp. 1994).

required by the Communications Act to "promot[e] economic opportunity and competition and [e]nsure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."²⁰ This Congressional mandate requires the Commission to ensure that rural telephone companies, such as Bay Springs Telephone Company, have a meaningful opportunity to provide broadband PCS. This statutory goal can only be accomplished by permitting rural telephone companies to bid directly in the auctions for the entrepreneurs' blocks.

Congress also did not restrict geographically where rural telephone companies could provide PCS. Congress required the Commission when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."²¹ Requiring a rural telephone company to bid on a certain territory that is less than a BTA or limiting where it can provide broadband PCS will impede, rather than promote, economic opportunity for rural telephone companies.

Restricting a rural telephone company's PCS service territory to no more than twice the population of a rural telephone company's

²⁰ 47 C.F.R. § 309(j)(3)(B).

²¹ 47 U.S.C. § 309(j)(4)(C).

wireline service area will increase the costs of providing PCS and impede effective competition with cellular and the PCS licensees on the MTA blocks. The Commission adopted service boundaries for broadband PCS that are larger than the metropolitan statistical areas (MSAs) and rural service areas (RSAs) in order to ensure "the efficient provision of regional or nationwide mobile service," "to lower costs of providing service," and "to spur market competition from new PCS providers by starting with larger initial geographic service areas to alleviate the cellular headstart advantage."²² For these same reasons, rural telephone companies should be allowed to bid in the auctions for the entrepreneurs' blocks for a PCS license that covers an entire BTA service area.

Service areas that are smaller than a BTA could also cause problems of interference between neighboring PCS licensees. A partitioned service area could be as small as one cell for a small, rural telephone company. The Commission's rules require the median field strength at any location on the border of the PCS service area to be limited to no more than 47 dBV/m.²³ However, controlling the signal strength at the PCS service area boundary limits becomes more difficult as the cell size is reduced. If the transmitter power is reduced, the lack of signal strength could result in the inability to place calls near the borders of the partitioned service area.

²² Memorandum Opinion and Order in GEN Docket No. 90-314, FCC 94-144, slip op. ¶ 76.

²³ 47 C.F.R. § 24.236.

It would also be contrary to the Communications Act to restrict rural telephone companies to bidding on licenses in the entrepreneurs' blocks where their local exchanges are located. The Communications Act mandates that the Commission "ensur[e] that new and innovative technologies are readily accessible to the American people".²⁴ The Commission should also promote the purposes specified in Section 1 of the Communications Act, which includes, among other things, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."²⁵ Not only are rural telephone companies well suited to introduce PCS services rapidly into their service areas, broadband PCS also provides an economical and efficient means for then to extend telephone service to those that lack it outside their local exchanges.

According to the 1990 census, the South contained one-half of those that lacked a phone although it accounted for about one-third of the Nation's households.²⁶ Mississippi had the highest phoneless rate of any state with 12.6% of all Mississippi households with no phone.²⁷ The phoneless rate in Alabama and Tennessee were 8.7% and 7.1%, respectively. TEC's rural telephone

²⁴ 47 U.S.C. § 309(j)(3)(B).

²⁵ 47 U.S.C. § 151.

²⁶ Bureau of the Census, U.S. Department of Commerce, Pub. No. SB/94-16, Statistical Brief, Phoneless in America (July 1994). (Attached hereto as Exhibit A.)

²⁷ Id.

companies already serve these three Southern states and would be well suited to help extend telephone service to these phoneless areas if they were permitted to bid on BTAs in the entrepreneurs' blocks outside their wireline service areas.

When the Commission defined a rural telephone company as those local exchange carriers having 100,000 or fewer access lines, including all affiliates, one of the Commission's goals was to prevent large local exchange carriers from qualifying for designated entity provisions.²⁸ The Commission may also be concerned that permitting rural telephone companies to bid directly in the auctions for the entrepreneurs' blocks without geographic limitations may invite large companies, such as AT&T, to purchase a rural telephone company. The Commission, however, can avoid such an outcome by limiting eligibility to bid in the auctions for the entrepreneurs' blocks to rural telephone companies that, together with their corporate affiliates, have less than \$300 million in total assets. The Commission must exclude the stock held by individual investors when determining whether a rural telephone company meets this total asset threshold in order to avoid counting those assets twice: once, when counting the value of the stock held by individual investors and, again, when counting the assets of the corporate affiliates that are already reflected in the value of the stock.

²⁸ Fifth Report and Order, slip op. ¶ 198.

IV. The Gross Revenue, Assets and Net Worth of Rural Telephone Companies Should Not be Attributed to or Aggregated with Affiliates

Small telephone companies that are part of an affiliated group, such as TEC, should be allowed the same bidding preferences accorded other small businesses. Without bidding credits, it would be virtually impossible for the Commission to assure that such small businesses achieve any meaningful measure of opportunity for actual participation in the provision of PCS.²⁹ Because they lack the enormous funds needed to effectively compete against larger PCS licensees such as AT&T and the Bell Operating Companies (BOCs), small telephone companies that are part of an affiliated group should also be able to pay for their winning bids in installments.³⁰

The Commission should not attribute and aggregate the gross revenues, assets and net worth of rural telephone companies and their affiliates. The courts have held that affiliation is not relevant when, as here, corporate and regulatory barriers prevent cross-pooling with these rural telephone companies.³¹ That case involved an affiliation rule which required average schedule companies to convert to cost status if they were affiliated with cost companies. The Court found this affiliation rule to be unreasonable because the Commission failed to consider regulatory

²⁹ Fifth Report and Order, slip op. ¶ 132.

³⁰ Id. ¶ 136.

³¹ National Ass'n of Regulatory Util. Comm'rs. v. FCC, 737 F.2d 1095, 1128 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227, 105 S.Ct. 1224 (1985).

or corporate barriers that prevent cost companies from bearing the cost burden of affiliated average schedule companies.

There is no reason for the Commission to believe that TEC's resellers could bear the cost burden of financing bids by TEC's small telephone companies. Regulatory and corporate barriers prohibit such cross-pooling between TEC's small, rural telephone companies and its resellers. State and federal regulations expressly prohibit such cross-subsidization among a local exchange carrier's affiliates. For example, local exchange carriers are required by the Commission's rules to pay for the assets transferred to them from their affiliates at the invoice price or fair-market value.³²

Furthermore, TEC's affiliates are separately incorporated with separate management and facilities and operate in different states. The Commission has found such structural separation to be an effective means of preventing cost-shifting.³³ Since they lack the ability to shift costs, TEC's small, rural telephone companies should qualify as small businesses and be eligible for small business bidding preferences.

V. TEC Qualifies as a Small Business Within the Meaning of Section 309(j)(3)(B) of the Communications Act

TEC's local exchange carriers qualify as rural telephone companies because they serve 50,000 or fewer access lines in any

³² 47 C.F.R. § 32.27(b).

³³ California v. FCC, 905 F.2d at 1228.

given study area.³⁴ TEC's local exchange carriers are also considered small by the Commission's rules. The Commission defines small telephone companies for purposes of filing tariffs as any local exchange carrier with annual revenue from regulated telecommunications operations of less than \$40 million, and 50,000 or fewer access lines.³⁵ Bay Springs Telephone Company has on file with the Commission such a small telephone company tariff.

All of TEC's local exchange carriers are also considered Tier 2 or Class B companies because they have annual revenues from regulated telecommunications operations of less than \$100 million.³⁶ The Commission imposes more relaxed regulatory requirements on Tier 2 local exchange carriers than on Tier 1 local exchange carriers.³⁷

Even if interaffiliate cross-pooling were possible, which it is not, this would not transform TEC into a large company. TEC, when combined with all its affiliates, has a net worth of less than \$30 million and total assets that are less than \$300 million. According to the Small Business Administration's Standard Industrial Classification for the telephone industry,³⁸ TEC is considered small because the total employees for all of its affiliated companies combined is substantially less than 1,500.

³⁴ 47 C.F.R. § 24.720(e).

³⁵ 47 C.F.R. §§ 61.39(a), 69.602(a)(3).

³⁶ 47 C.F.R. § 32.11(a)(2).

³⁷ Fifth Report and Order, slip op. n.99.

³⁸ 13 C.F.R. § 121.601, No. 4813.

While TEC's reseller affiliates had combined gross revenues of more than \$125 million in each of the last two calendar years, a substantial portion of this gross revenue is passed on to the BOCs in the payment of access charges. These volume intensive small businesses have extremely small profit margins.

The Commission proposed to define small businesses pursuant to the definition devised by the Small Business Administration,³⁹ on the basis of a report prepared by the Small Business Advisory Committee to the Federal Communications Commission.⁴⁰ According to the SBAC Report, the SBA defines a small business as one with a net worth not in excess of \$6 million with an average net income after federal taxes for the two preceding years not in excess of \$2 million.⁴¹ A business may also be defined as small if it meets the size standard for the industry in which it is primarily engaged.⁴²

The Commission applied the SBA's \$6 million net worth test to determine eligibility for bidding preferences for small businesses during the auctions of the narrowband PCS and the Interactive Video Data Service (IVDS) licenses.⁴³ The Commission determined that narrowband PCS and IVDS involved relatively low capital entry

³⁹ Notice of Proposed Rulemaking in PP Docket No. 93-253, 8 FCC Rcd at 7647.

⁴⁰ Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314, (Sept. 15, 1993) (hereinafter referred to as SBAC Report).

⁴¹ Id. at n.51.

⁴² Id.

⁴³ 47 C.F.R. §§ 1.2110(b)(1), 24.309, and 95.816(d).

requirements.⁴⁴ However, the Commission indicated that, on a service-specific basis, it would adjust this definition of small business upward to accommodate capital intensive telecommunications businesses.⁴⁵

VI. The Commission's Gross Revenue Criteria Are Not Rationally Related to Their Purpose and Should Be Eliminated

The Commission established two entrepreneurs' blocks, frequency blocks C and F, for which large companies are prohibited from bidding.⁴⁶ A large company is defined as an entity, together with its affiliates, having annual gross revenues of \$125 million or more or \$500 million or more in total assets.⁴⁷ In addition, the Commission prohibited applicants from bidding on the licenses in the entrepreneurs' blocks if any one individual investor in, or affiliate of, an applicant has a personal net worth of \$100 million or greater.⁴⁸

This rule is intended to address the problem "that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large

⁴⁴ In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding in PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330, 2337 (1994); In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding in PP Docket No. 93-253, Third Report and Order, 9 FCC Rcd 2941, 2969 (1994).

⁴⁵ Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd at 2396.

⁴⁶ Fifth Report and Order, slip op. ¶ 121.

⁴⁷ Id. ¶ 113.

⁴⁸ Id. ¶ 121.